

Date: August 20, 1997

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In re:

Applicant for Security Clearance

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ISCR Case No. 97-0266

## **DECISION OF ADMINISTRATIVE JUDGE**

**JEROME H. SILBER**

### **APPEARANCES**

#### **FOR THE GOVERNMENT**

William S. Fields, Esq.

Deputy Chief Department Counsel

#### **FOR THE APPLICANT**

*Pro se*

### **STATEMENT OF THE CASE**

On April 14, 1997, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked. In an undated and unsworn written statement, the Applicant responded to the allegations set forth in the SOR and elected to have his case decided on a written record, in lieu of a hearing. A copy of the SOR is attached to this Decision and incorporated herein by reference.

The Applicant received a complete copy of the file of relevant material (FORM) on June 26, 1997. The Applicant also received an opportunity then to file objections and submit material in refutation, extenuation, or mitigation. The Applicant elected not to respond to the FORM within the requisite 30 days, *i.e.*, on or before July 26, 1997. The record in this case closed on July 26, 1997. The undersigned Administrative Judge received the case assignment on July 29, 1997.

### **FINDINGS OF FACT**

The Statement of Reasons (SOR) consisted of allegations predicated on a single criterion: paragraph 1, Criterion G (alcohol consumption). The Applicant has admitted the factual allegations contained in subparagraphs 1.b., 1.c., and 1.d. of the SOR. [\(1\)](#)

The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following Findings of Fact:

The Applicant is a 44-year-old pipe welder employed by a U.S. Government contractor for the last ten years. The Applicant seeks to obtain a personnel security clearance.

The Applicant started consuming beer when he was 13 or 14 years old. He generally did not abuse alcohol and drank on average a six-pack of beer a week and no hard liquor. He did not become intoxicated to the point of passing out or not being able to physically function.<sup>(2)</sup> This pattern changed in about 1993 when he was 40 years old and encountered serious marital problems. From about 1993 the Applicant began drinking 4-12 beers 2-3 times a week.

The Applicant has been arrested twice for Driving Under the Influence (DUI): once on July 22, 1994 (0.20% BAC) and again on July 23, 1996 (0.18+% BAC). FORM item 4, page 3. He was alcohol abstinent for 4-5 months after his first DUI and reduced his drinking somewhat for a few months after his second DUI. FORM item 4, pages 1-2, *but see* item 5, page 1. After his first DUI, the Applicant was required to undergo an assessment on September 13, 1994, and a "24-hour intensive intervention" school on September 27, 1994. FORM item 9. In about November 1994 he attended an alcohol and/or drug rehabilitation outpatient program 2-4 hours per night twice a week for eight weeks. FORM item 4, page 3. On March 10, 1995, he also completed an alcohol/drug program of an uncertain type and duration. FORM item 10.

## POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluating an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The criteria, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

### **CRITERION G - ALCOHOL CONSUMPTION**

**Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.**

**Conditions that could raise a security concern and may be disqualifying include:**

- (1) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use;
- (4) habitual or binge consumption of alcohol to the point of impaired judgment;

**Conditions that could mitigate security concerns include:**

None applicable.

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section F.3:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.
- e. Absence or presence of rehabilitation.

f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct

The circumstances surrounding the conduct, to include knowledgeable participation

The frequency and recency of the conduct

The individual's age and maturity at the time of the conduct

The voluntariness of participation

The presence or absence of rehabilitation and other pertinent behavioral changes

The motivation for the conduct

The potential for pressure, coercion, exploitation, or duress

The likelihood of continuation or recurrence

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge may only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial [of a security clearance] by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations.

*Dept. of the Navy v. Egan*, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go to the minimum *quantum* of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence -- rather than as an indication of the Court's tolerance for error below. <sup>(3)</sup>

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the Government's case or through evidence of affirmative defenses. Assuming the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a security clearance. <sup>(4)</sup>

## CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, the undersigned

concludes that the Government established its case with regard to Criterion G.

The Applicant has had three alcohol-related incidents within the last seven years and has a history of habitual and excessive alcohol consumption within at least the last four years. This conduct falls within the scope of DC #1 and DC #4, identified on page 3 *supra*. Although he has been exposed to several alcohol education and rehabilitation programs in 1994-95, he continues to drink alcohol and, indeed, had an arrest for DUI only a year before the close of the record. He has not significantly reduced the rate of his alcohol consumption, has not attended meetings of Alcoholics Anonymous (AA) or a similar organization, and has not made positive changes in behavior supportive of sobriety. In absence of evidence of extenuation or mitigation, the undersigned Administrative Judge concludes SOR paragraph 1 adversely to the Applicant

Each case decision is required to consider, as appropriate, the factors listed in Section F.3 and enclosure 2 to the Directive. Those factors are identified on pages 3-4 *supra*. The Applicant has a serious and continuing alcohol problem that he denies. He stated in a sworn statement to a Defense Investigative Service (DIS) agent on October 16, 1996, that, while he does not feel he has an alcohol problem and he has never really felt that he needed to cut down on his drinking, he "intends on stopping totally after his court date" for his second DUI. FORM item 4, page 2. The absence of current rehabilitation as well as the occurrence of a second DUI after he received counseling--and, indeed, education in the course of alcoholism--suggest recurring and deepening health problems yet await the Applicant.

### FORMAL FINDINGS

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item 25 of Enclosure 3 of the Directive are:

Paragraph 1. Criterion G: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

### DECISION

In light of all the circumstances presented by the record in this case, it is the determination of the undersigned that it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

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Jerome H. Silber

Administrative Judge

1. The FORM included a copy of the Applicant's undated and unsworn SOR answer. He entered no objection thereafter to this deviation from item 4 of the additional procedural guidance (encl. 3 to the Directive).

2. The Applicant did have an alcohol-related incident prior to 1993: he was arrested on September 18, 1990, on charges of public drunk and disorderly conduct after he got into an argument about business after drinking. FORM item 7.

3. The rule has been restated as requiring "that security clearances should be revoked [*sic*] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D.Cal. 1992). *Cf.* with regard to the *quantum* of evidence the DISCR Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA

Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:

[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the [DISCR] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.

Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. §556(d).

4. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).